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In the

Supreme Court of the United States

October Term, 2002

COMMONWEALTH OF VIRGINIA,

PETITIONER,

v.

KEVIN LAMONT HICKS,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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CONSENT TO FILE

Written consent to file in this matter was provided by all parties and is on file with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and press. The Center has, since its opening in 1990, pursued the mission in various forms, including the filing of *amicus curiae* briefs in both state and federal courts in cases involving a variety of free expression issues.

STATEMENT OF FACTS

This case involves the criminal conviction of respondent, Kevin Lamont Hicks, for trespass in violation of a "barment" notice issued to him by the Richmond, Virginia, Housing Authority. That notice was issued by the Housing Authority's manager, Gloria Rogers, who exercised the unfettered discretion given to her under the Housing Authority Policy. Hicks, who did

not reside in the Whitcomb Court project, was seeking to visit his wife and infant son, who were residents. Hicks had previously been excluded from the project under circumstances that led to issuance of the barment notice.

The City of Richmond enacted an ordinance in 1997 that purported to render streets within the Whitcomb Project "closed to public use and travel" as part of a program to eradicate illegal drug activity. The ordinance attempted to "privatize" the streets in and adjacent to the Housing Authority by deeding those streets directly to the Housing Authority.

Respondent Hicks was charged and convicted of trespass in General District Court. On appeal, the Virginia Court of Appeals reversed the conviction on the grounds that the ordinance abridged citizens' First and Fourteenth Amendment rights to be present at a public place and was not narrowly tailored to serve valid government interests. *Hicks v. Commonwealth of Virginia*, 36 Va. App. 49, 548 S.E.2d 249 (2001). The Virginia Supreme Court affirmed that judgment in substantial part, ruling that the trespass policy was overly broad and finding Hicks a proper party to present such a challenge. *Commonwealth of Virginia v. Hicks*,

264 Va. 48, 563 S.E.2d 674 (2002). The Commonwealth appealed that decision and this Court granted certiorari.

SUMMARY OF ARGUMENT

Four clearly established points should guide the disposition of this case. First, access to government property has been severely restricted by an official policy of the City of Richmond. The property in question is not of the type that is inherently inappropriate for expressive activity; to the contrary, the site includes streets and sidewalks, places which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). The fact that such streets lie within a troubled public housing project does not alter the fundamental constitutional interests; indeed, such a location enhances the importance of access, since barring the gates may severely curtail the ability of residents to receive vital information. *Cf. Marsh v. Alabama*, 326 U.S. 501 (1946).

Second, a public official has under state law been given virtually unfettered discretion to limit or condition access to this

public property, in clear violation of such judgments of this Court as *Kunz v. New York*, 340 U.S. 290 (1951) and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The gravity of the departure from this Court's insistence on precision and specificity in limiting access has even been candidly acknowledged by the very official who exercises that authority.

Third, Respondent Hicks is an entirely appropriate person to press such a First Amendment challenge to these policies. He was criminally charged with entering public property in violation of the challenged policies, under circumstances where the directness and immediacy of his interests could hardly be doubted. Whatever may have been the nature of his mission at the time he was denied entry, the issues he seeks to raise here are indistinguishable from those which would be presented by a person who sought access to this site for traditionally expressive purposes.

Fourth and finally, the judgment of the Virginia Supreme Court does not disable government from maintaining order and dealing effectively with such indisputable threats as drug traffic in public housing projects. This Court has very recently provided ample guidance to those who manage public property and who

seek, as they must, to balance the needs of government in administering that property with the historic First Amendment rights of citizens to disseminate and receive information on public premises. *See Thomas v. Chicago Park District*, 534 U.S. 316 (2002).

For these reasons, more fully developed in the arguments that follow, *amicus curiae* respectfully urges affirmance of the judgment below.

I. THE PROPERTY IN ISSUE HERE IS NOT ONLY PUBLIC IN EVERY RESPECT, BUT IS ESPECIALLY SUITED TO EXPRESSIVE ACTIVITY.

The locus of this dispute is, without question, property owned and operated by government. Whatever may have been the agreement between the City of Richmond and the Housing Authority with regard to the ownership, governance, and management of this property, the site has in no degree lost its historically public character. Moreover, the particular property to which access has been denied is the most "public" component of the public housing project – streets and sidewalks where, as this

Court made clear well over sixty years ago, "assembly, communicating thoughts between citizens, and discussing public questions" are clearly appropriate and constitutionally protected activities, *Hague v. CIO*, 307 U.S. 496, 515 (1939). Whatever may be the subtleties and nuances of the later development of the public forum doctrine, *Hague* remains the guidepost for expressive activity on public streets and sidewalks.

Without doubt, certain types of public property are not suited to the full range of expressive activity. The operating room of a city or county hospital comes immediately to mind as an example of publicly owned and managed premises on which protests and demonstrations would not be appropriate. But even here caution is in order. Much the same might be said of the reading room of a public library, where quiet and order are essential to the primary use of that site. Yet as this Court made clear in *Brown v. Louisiana*, 383 U.S. 131 (1966), by reversing the conviction of peaceful and quiet protestors who assembled in the reading room of a public library to challenge racially discriminatory access policies, First Amendment activity may not be totally barred from such a site despite the obvious

incompatibility of some forms of protest with the site's primary use. If a peaceful reading-room sit-in must be tolerated by those who manage a public library, the inclination to place any government property off limits for First Amendment purposes must be approached with great caution.

A public housing project presents an especially compelling case for such caution, however great the need for order and crime control may be. Certain kinds of expressive activity might, for example, interfere unacceptably with the tenants' lives – much as loud shouting and stomping by protestors would thwart the primary use of a public library's reading room. Yet to bar all such activity from a housing project would risk denial of vital information to those very tenants whose interests would be protected by other types of restrictions. If a privately owned company town cannot keep its residents completely in the dark by excluding religious proselytizers, as this Court ruled in *Marsh v. Alabama*, 326 U.S. 501 (1946), surely a government entity which bears a similar relationship to its tenants is comparably constrained. If the indisputably private title to the company town was "not sufficient to justify the State's permitting a corporation to govern a

community of citizens so as to restrict their fundamental liberties," *id.* at 509, surely a government agency that owns and manages a public housing project must be similarly sensitive to the informational interests of its residents.

II. A PUBLIC OFFICIAL MAY NOT EXERCISE UNFETTERED DISCRETION IN GRANTING OR DENYING ACCESS FOR EXPRESSIVE ACTIVITY ON GOVERNMENT PROPERTY.

The record in this case makes unmistakably clear that a public official has been given unfettered discretion to grant or deny access to the public housing project from which respondent was barred. Despite the State's argument that Hicks' arrest arose under the written policies, those policies leave the public official with unfettered discretion to determine whether a given use of the property is legitimate. That discretion has, moreover, been exercised in a manner which reflects its open-endedness and lack of guidance, as the Housing project's manager, Mrs. Rogers, candidly conceded in her testimony. *Hicks*, 264 Va. at 59-60, 563 S.E.2d at 680-81. Indeed, when she testified that she would permit non-residents to distribute material within the project only if she

were "used to seeing" such material, and acknowledged that there were no statutory guidelines governing her decision, the scope and breadth of her discretion became startlingly clear. This unfettered discretion played a major role in the judgment of the court below to invalidate the access policy on First Amendment grounds. *Id.* at 58-60, 563 S.E.2d at 680-81.

At least since *Kunz v. New York*, 340 U.S. 290 (1951), this Court has consistently held that unfettered discretion may not govern the grant or denial of access to public property. Where a statute or "ordinance . . . gives an administrative official discretionary power to control in advance the rights of citizens to speak . . . the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights." *Id.* at 293. That view has been often reaffirmed, perhaps most recently in *Forsyth County v. Nationalist Movement*, 505 U.S. at 133, which recognized that "[t]he First Amendment prohibits the vesting of . . . unbridled discretion in a government official." As later cases like *Forsyth County* make clear, not only does a totally standardless policy fail to meet First Amendment strictures; a policy which contains some

standards, but which nonetheless permits official judgments to be based on the content of the speech is equally flawed.

Since, as the court below found, "the Housing Authority has not implemented written procedures or guidelines concerning the enforcement of the trespass policy," the challenged trespass policy is clearly inadequate as applied to those who seek access to the public housing project, whatever their reasons. In analyzing government access policies, no distinction may properly be drawn between property that government regulates or manages in its "sovereign" capacity and property that it administers in its role as "landlord." Whatever variations in the assertion of specific regulatory interests those labels might invite, this Court has never held that vesting unfettered discretion in a public official is compatible with First Amendment standards, regardless of the relationship between government and the specific property. Thus, the Virginia Supreme Court's ruling with respect to the trespass policy should be affirmed on the basis of clearly settled precedent in this Court.

III. RESPONDENT HICKS IS AN APPROPRIATE PERSON TO PRESENT A FIRST AMENDMENT CHALLENGE TO THE POLICY UNDER WHICH HIS ACCESS WAS BARRED.

Before addressing respondent's right to challenge the trespass policy on First Amendment grounds, a threshold issue deserves brief attention. The Commonwealth argued in the courts below that, instead of appealing his criminal conviction for flouting the barment notice he had received from the Housing Authority, respondent's only remedy was to contest the barment notice in a separate proceeding. The Virginia Supreme Court, however, flatly rejected such a claim, ruling as a matter of state law that a challenge through a proceeding such as this one was entirely appropriate. *Hicks*, 264 Va. at 54, 563 S.E.2d at 677. Even the dissenting justices accepted that part of the majority's ruling, making this a unanimous conclusion. *Id.* at 67, 563 S.E.2d at 685. Although the issue is no longer contested in this Court, the clarity with which the Virginia courts have validated this essentially collateral route of challenge to the trespass policy helps to frame the more difficult question of the propriety of the constitutional challenge as such.

Several important factors may guide the resolution of the issue on which the court below was sharply divided. This is not a hypothetical or conjectural dispute. There is not the slightest doubt about the adversity of interests or the clarity of the dispute between the two parties as they come before this Court. Because respondent faces criminal conviction under a statute that may be unconstitutionally broad, this case clearly meets the injury-in-fact requirement for standing. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988). The respondent's potential conviction is a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), that obviously has a "traceable causal connection" to the policy in question, *Larson v. Valente*, 456 U.S. 228, 239 (1982). Moreover, the range of constitutional issues that Hicks presses here, and which the courts below fully addressed, are virtually indistinguishable from the interests that a visitor who presented a more conventional expressive claim would raise – for example, one who sought to address the tenants orally or by distributing literature within the housing project. It is also significant that the activity in which respondent was engaged at the time of his arrest –bringing diapers to his infant son inside the

housing project – was not only entirely lawful but was also clearly non-disruptive. Thus, the present case seems an appropriate one in which to reach and decide the merits of an especially important First Amendment issue.

This Court has consistently recognized that a person may challenge a statute as overbroad even though that person's conduct might be reached by a narrower law. Indeed, the Court "has consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), a proposition that this Court recently reaffirmed in *Forsyth County*, 505 U.S. at 129.

All that is necessary for such a challenge is "a judicial prediction or assumption that the statute's very existence may cause other parties not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In other words, this Court has permitted such challenges when there is "a realistic danger that the statute itself will significantly compromise recognized First

Amendment protections of parties not before the Court." *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Whatever valid concern there may be for limiting such challenges to situations of "substantial overbreadth" pertains more to adjudicating the merits of a constitutional claim than to the issue of standing; this Court has explained that the substantial overbreadth inquiry is "more properly reserved for the determination of [a] . . . challenge on the merits" than to a party's status as a challenger. *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 948 (1984).

To the extent that demonstration of "substantial overbreadth" is seen as pre-requisite to constitutional challenge, the circumstances of this case leave no doubt that this test has been more than fully met. In its brief, the Commonwealth concedes that the degree to which a statute must reach protected expression before it is deemed "substantial" varies with the circumstances of the case. *Brief of Petitioner* at 18. As noted above, the absence of any standards to guide or constrain the project manager's discretion in granting or denying access, reinforced by her remarkably candid testimony about the eclectic way in which she

administered the trespass policy, graphically demonstrate the unfettered discretion to control both who may speak and what is spoken in Whitcomb Court. Moreover, this control extends beyond the halls, corridors and apartments of the buildings in Whitcomb Court to the streets and sidewalks of the community—areas that this Court has repeatedly stated are important venues for public expression. *E.g., Hague,* 307 U.S. at 515. Further, the Housing Authority's policy intrudes directly on the First Amendment rights of Whitcomb Court residents to receive information. As this Justice Brennan wrote in *Lamont et. al. v. Postmaster General,* "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

In this case, even though the Housing Authority's policy does not explicitly address expression, its impact on the First Amendment rights of both visitors and residents of Whitcomb Court would be little greater even if the policy specifically prohibited expressive activity by all non-residents. As such, and where the constitutional issues are posed after having been fully

canvassed by the courts below, the propriety of review seems beyond doubt.

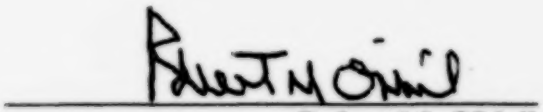
IV. THE JUDGMENT OF THE VIRGINIA SUPREME COURT DOES NOT LEAVE PUBLIC OFFICIALS POWERLESS TO PROTECT GOVERNMENT PROPERTY AND ITS USERS FROM CRIME.

The judgment of the court below properly holds public officials to high standards in shaping rules of access to government property. It does not, however, disable those officials in their mission to protect housing projects and their tenants from criminal activity such as rampant drug traffic. What is needed, and is entirely feasible for those who manage such property, is the degree of precision and sensitivity which this Court recently commended in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). That judgment sustained a set of clear and specific criteria for the approval or disapproval of applications for the use of municipal park space, coupled with a carefully prescribed and effective process by which to appeal a negative decision. The Court noted, approvingly, that "[n]one of the grounds for denying a permit has anything to do with what a speaker might say." 534 U.S. at 316.

In ruling that the stricter standards imposed by *Freedman v. Maryland*, 380 U.S. 51 (1965), did not apply to such actions, this Court recognized the realities of managing municipal property in a complex modern urban community. Surely those who govern the Richmond Housing Authority are as fully capable as were Chicago's park supervisors of fashioning such precise guidelines, and of applying them in a content-neutral, readily appealable, fashion.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urge this Court to affirm the judgment of the court below.



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